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No. 05-996

Supreme Court, U.S.
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In The Supreme Court of the United States

ROBERT LOUIS MARRAMA,

Petitioner,

v.

CITIZENS BANK OF MASSACHUSETTS, and MARK G. DeGIACOMO, CHAPTER 7 TRUSTEE,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Does a bankruptcy court have the discretion to deny a debtor's motion to convert a bankruptcy case from chapter 7 to chapter 13 when the court finds that the debtor filed the bankruptcy petition and/or the motion to convert in bad faith?

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PRELIMINARY STATEMENT

This matter arises out of the chapter 7 bankruptcy case of Petitioner, Robert Louis Marrama ("Marrama" or the "Petitioner"). The United States Bankruptcy Court sustained the objections filed by Respondent, Mark G. DeGiacomo, trustee of the bankruptcy estate of Robert Louis Marrama ("DeGiacomo," "the Trustee" or the "Respondent"), and Citizens Bank of Massachusetts ("Citizens Bank") and denied the Petitioner's Verified Notice of Conversion to Chapter 13. The issue on appeal is whether 11 U.S.C § 706(a) allows the bankruptcy court to deny an individual chapter 7 debtor's request to convert his or her case to chapter 13.

STATEMENT OF THE CASE

A. The Bankruptcy Petition

On March 11, 2003, Marrama commenced his bankruptcy case by filing a petition for relief under chapter 7 of the Bankruptcy Code, 11 U.S.C. §§ 101 et seq. (the "Petition Date"). On March 11, 2003, DeGiacomo was appointed as the interim chapter 7 Trustee of Marrama's bankruptcy estate. 11 U.S.C. § 701(a)(1).[1] The Bankruptcy Code provides that immediately upon the filing of the bankruptcy petition, a bankruptcy estate is formed which includes virtually all of the debtor's assets. 11 U.S.C. § 541(a). The duties of a chapter 7 bankruptcy trustee

[1] When the creditors' meeting held pursuant to 11 U.S.C. § 341 was concluded without a request for a trustee election, DeGiacomo became the permanent chapter 7 trustee of this bankruptcy estate. 11 U.S.C. § 702(d).

include investigating the financial affairs of the debtor, collecting property of the bankruptcy estate and reducing the property to currency for the benefit of the creditors of the bankruptcy estate. 11 U.S.C. § 704(a)(1) and (4). The trustee's investigation of the assets of a debtor's bankruptcy estate generally commences with the trustee's review of the debtor's bankruptcy petition. The bankruptcy petition includes certain form schedules and a statement of financial affairs, all of which the debtor is required to complete and file with the Bankruptcy Court. 11 U.S.C. § 521; Fed. R. Bankr. P. 1007. Schedule A to a debtor's bankruptcy petition requires that the debtor list any interest that he or she may have in real property. SJA 4.[2] Schedule B to a debtor's bankruptcy petition requires that the debtor list any interest the debtor may have in personal property. SJA 5-6. Schedule C to a debtor's bankruptcy petition requires that the debtor list all property he or she wishes to exempt from the bankruptcy estate. SJA 7, 11 U.S.C. § 522. The statement of financial affairs is comprised of a series of questions to be answered by the debtor which are meant to elicit information that may be helpful to the trustee in connection with the recovery of assets for the bankruptcy estate. SJA 21-27.

A debtor is required to sign his or her schedules, statement of financial affairs and the bankruptcy petition as a whole under the penalty of perjury. SJA 2, 20 and 27.[3]

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[2] "JA" refers to the Joint Appendix. "SJA" refers to the Supplemental Joint Appendix.

[3] The statement signed in connection with the bankruptcy petition as a whole reads as follows: "I declare under penalty of perjury that the information provided in this petition is true and correct." SJA 2.

(Continued on following page)

Question 18 on Schedule B to a debtor's bankruptcy petition requires that the debtor list all property described as follows: "Equitable or future interests, life estates, and rights or powers exercisable for the benefit of the debtor other than those listed in Schedule of Real Property." SJA 6.

Marrama answered Question 18 as follows: "Debtor is 100% beneficiary of Bo-Mar Realty Trust the res of which is real property in Maine in which the debtor intends to live. The Trust is a spendthrift trust." *Id.*

Also, in response to Question 18, Marrama listed the value of his interest in the Bo-Mar Realty Trust as "0". *Id.*

On Schedule C to his bankruptcy petition, Marrama included the following statement: "The beneficial interest in Bo-Mar Realty Trust is not property of the estate pursuant to 11 U.S.C. § 541(c)." SJA 7.

Question 10 on the Statement of Financial Affairs asks debtors to: "List all other property, other than property transferred in the ordinary course of business or financial affairs of the debtor, transferred either absolutely or as security within one year immediately preceding the commencement of this case." SJA 23.

The statement signed in connection with the schedules to the bankruptcy petition reads as follows: "I declare under the penalty of perjury that I have read the foregoing summary and schedules, consisting of _____ sheets, and that they are true and correct to the best of my knowledge, information and belief." SJA 20.

The statement signed in connection with the statement of financial affairs reads as follows: "I declare under the penalty of perjury that I have read the answers contained in the foregoing statement of financial affairs and any attachments thereto and that they are true and correct." SJA 27.

Marrama's response to Question 10 was: "None." *Id.*

Question 17 on Schedule B to a Bankruptcy Petition directs the debtor to: "Identify other liquidated debts owing debtor, including tax refunds." SJA 6.

Marrama's response to Question 17 on Schedule B was: "None." *Id.*

B. The Creditor's Meeting

Immediately upon the filing of a chapter 7 bankruptcy petition, the Bankruptcy Code requires that a meeting of creditors be scheduled that is presided over by the interim trustee, 11 U.S.C. §§ 341 and 343; Fed. R. Bankr. P. 2003. Notice of the date, time and place of the creditors' meeting is given to all parties in the bankruptcy case. Fed. R. Bankr. P. 2002. At the commencement of the creditors' meeting, the bankruptcy trustee administers an oath to the debtor after which the debtor is questioned by the trustee concerning the debtor's assets and liabilities. Generally, the trustee also offers creditors the opportunity to ask questions of the debtor. The questions asked by the trustee usually track the debtor's schedules and statement of financial affairs which are reviewed by the trustee prior to and during the creditors' meeting. If, after asking these questions and allowing any creditors to ask questions, the trustee is satisfied that he has no other questions and does not require any additional documentation, the trustee will conclude the meeting. If, on the other hand, the trustee feels that there are additional questions which need to be asked of the debtor and/or additional documentation which the debtor needs to produce to the trustee, the creditor's meeting is continued on the record usually to a specific date and time. Creditors' meetings are electronically

recorded, and the recordings are maintained by the office of the United States Trustee.

The first session of Marrama's creditors' meeting was held on April 24, 2003 (the "Creditors' Meeting"). JA 36a. Although the sworn responses given by Marrama to questions contained in the schedules and statement of financial affairs indicated that Marrama's interest in the Bo-Mar Realty Trust had no value and, in any event, was not property of the estate, DeGiacomo asked many questions concerning this asset. JA 40a, 63a, 75a. Based on Marrama's answers to DeGiacomo's questions and the documents obtained by DeGiacomo, it was determined that: (a) in 1998, Marrama purchased certain real estate known and numbered as 10 Norton Avenue, York, Maine (the "Maine Property") for a total purchase price of $40,000.00 (the "Purchase Price"), JA 54a-55a; (b) Marrama paid the Purchase Price for the Maine Property by using $4,000.00 of his own funds as a down payment and by executing a $36,000.00 promissory note in favor of the seller of the Maine Property, which obligation was secured by a first mortgage on the Maine Property (the "Seller's Mortgage"), JA 55a; (c) subsequent to his purchase, Marrama paid for a substantial amount of work on the Maine Property, JA 56a; (d) on or about July 24, 2002, Marrama obtained a loan from Bank One, N.A. in the amount of $135,000.00 (the "Bank One Loan"), JA 56a-57a, and secured the obligation to repay the Bank One Loan by granting Bank One, N.A. a mortgage on the Maine Property (the "Bank One Mortgage"), JA 56a-57a; (e) after using the proceeds of the Bank One Loan to pay the balance due on the Seller's Mortgage, Marrama received net proceeds from the closing of the Bank One Mortgage in the amount of $118,100.40 (the "Net Proceeds"), JA 57a-58a; (f) Marrama

estimated that during the year prior to the Petition Date, the value of the Maine Property was approximately $220,000.00, JA 59a; (g) in August of 2002, approximately seven months prior to the Petition Date, Marrama transferred the Maine Property, for no consideration, to the Bo-Mar Realty Trust (the "Trust" and the "Transfer"); (h) the Declaration of Trust for the Trust indicates that Marrama is (i) the holder of 100% of the beneficial interest in the Trust, (ii) Josephine Bollettiero ("Bollettiero"), Marrama's girlfriend, was the sole trustee of the Trust, (iii) the Trust is revocable, JA 84a-87a; and (iv) the Maine Property was the only asset owned by the Trust, JA 53a. When DeGiacomo asked Marrama why he had transferred the Maine Property into the Trust, Marrama responded that the transfer was done "to try to protect it," JA 75a.

After eliciting this testimony from Marrama, DeGiacomo advised Marrama's counsel that he questioned the validity of the Trust. JA 59a. It is undisputed that immediately upon the conclusion of the first session of the Creditors' Meeting, DeGiacomo advised Marrama's attorney that DeGiacomo would be pursuing the recovery of the Maine Property for the bankruptcy estate. JA 15a and 30a.

C. Notice of Conversion

On June 23, 2003, Marrama filed a Verified Notice of Conversion to Chapter 13 (the "Verified Notice").[4] JA 1a and 11a. The Verified Notice did not disclose the reason Marrama wanted to convert his case to chapter 13. JA 11a.

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[4] Although this pleading was captioned as a "Notice," Fed. R. Bankr. P. 1017(f)(2) requires that requests for conversion pursuant to 11 U.S.C. § 706(a) must be made in the form of a motion.

On July 1, 2003, DeGiacomo filed the Chapter 7 Trustee's Opposition to Debtor's Verified Notice of Conversion to Chapter 13 (the "Trustee's Opposition"). JA 1a and 13a. On July 22, 2003, Citizens Bank filed Citizens Bank of Massachusetts' Opposition to Debtor's Verified Notice of Conversion to Chapter 13 (the "Citizens' Opposition"). JA 1a and 19a. The Trustee's Opposition argued that because Marrama had attempted to mislead the Trustee with the answers contained in his schedules and statement of financial affairs "the Debtor's request for conversion is made in bad faith, and conversion of the case would constitute an abuse of the bankruptcy process". JA 17a. Citizens' Opposition argued that Marrama's prepetition conduct concerning Citizens Bank's claim, as well as the misrepresentations concerning the Maine Property in the schedules and statement of financial affairs, constituted bad faith which should bar Marrama's efforts to convert his case to chapter 13. JA 19a-25a.

D. The Tax Refund

When asked during the Creditors' Meeting whether anyone owed him any money, Marrama's response was "no." JA 50a.

As stated earlier, Marrama responded "None" to Question 17 on Schedule B to the bankruptcy petition which asks the debtor to: "Identify other liquidated debts owing debtor, including tax refunds." SJA 6.

On or about August 20, 2003, approximately one week prior to the hearing, DeGiacomo's counsel was contacted by the Internal Revenue Service (the "IRS") and asked to whom the Debtor's tax refund check should be sent. JA 30a-31a. The IRS advised DeGiacomo's counsel that

Marrama had filed an amended tax return in July of 2002 in which Marrama asserted his right to a tax refund. JA 30a-31a. On September 5, 2003, DeGiacomo received a check from the IRS for Marrama's tax refund in the amount of $8,745.86 (the "Tax Refund"). *Marrama v. Citizens Bank of Massachusetts* (*In re Marrama*), 430 F.3d 474, 476 (1st Cir. 2005).

E. The Hearing

On August 27, 2003, United States Bankruptcy Judge William C. Hillman conducted a hearing concerning the Verified Notice and the Oppositions filed by DeGiacomo and Citizens Bank (the "Hearing"). During the Hearing, counsel to the Trustee advised Judge Hillman concerning Marrama's testimony at the Creditors' Meeting and the responses provided by Marrama in his schedules and statement of financial affairs. The Trustee's counsel argued that because of the misleading and false statements contained in those documents, Marrama should not be allowed to convert his case to chapter 13.[5] JA 29a-31a.

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[5] Subsequent to the Hearing, the Trustee's investigation exposed several other misstatements contained in Marrama's bankruptcy petition and statement of financial affairs. For example, Marrama:

1) failed to disclose, in response to Question 10 on the statement of financial affairs, the granting of the Bank One Mortgage on the Maine Property which occurred within a year of the Petition Date;

2) failed to disclose, in response to Question 10 on the statement of financial affairs, the transfer of $109,000.00 of the Net Proceeds to Bollettiero within a year of the Petition Date. *Marrama v. Citizens Bank of Massachusetts* (*In re Marrama*), 445 F.3d 518, 520 (1st Cir. 2006); *Citizens Bank of Massachusetts v. Marrama* (*In re Marrama*), 331 B.R. 10, 13 (D. Mass. 2005).

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Counsel to Citizens Bank advised Judge Hillman of actions taken by Marrama prior to the Petition Date with regard to Citizens Bank's claim and in connection with a Fed. R. Bankr. P. 2004 examination of Marrama. JA 31a-32a. The standing chapter 13 Trustee for the Eastern Division of the District of Massachusetts also addressed Judge Hillman and stated that, based on the facts presented, Marrama would not be able to propose a confirmable chapter 13 plan since he would be unable to satisfy the requirement that he pay, during the term of the chapter 13 plan, at least the full value of the non-exempt equity in his assets. JA 34a. During his argument to Judge Hillman, counsel to Marrama did not contest any of the relevant facts asserted by the opposing parties or the chapter 13 Trustee nor did he request an evidentiary hearing.[6] JA 33a. Rather, counsel to Marrama argued that the only reason Marrama had filed his case under chapter

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3) failed to list Bank One as a creditor on Schedule F. SJA 12-15;

4) failed to list the monthly payments he was making on the Bank One Loan on his original Schedule J (indicating that the 'home mortgage' he was paying was for "Glouceter" [sic]). SJA 19. Only after the Trustee's Opposition was filed did Marrama file an amended Schedule J which listed the Bank One Loan payment under "other." SJA 31; and

5) failed to list the Maine Property as his current address although he later testified, and stated in the brief he filed with this Court, that he was living there as of the Petition Date. SJA 1, JA 71a.

Any of these disclosures would have risked encouraging questioning by the Trustee about the Maine Property.

[6] Counsel to Marrama did contest the assertion that Marrama was receiving rental income on the Petition Date. This was a minor point that was mentioned by counsel to the Trustee during oral argument.

7 rather than a chapter 13 was that he was unemployed on the Petition Date. Counsel stated that since Marrama had recently found employment, he was now ready to proceed under chapter 13.[7] Counsel to Marrama indicated that the failure to disclose the transfer of the Maine Property in response to Question 10 on the statement of financial affairs was a "scrivener's error." JA 33a. No justification was offered concerning the statements contained in Schedule B or C about the Trust. Finally, with regard to the Tax Refund, Marrama's counsel told Judge Hillman that he and Marrama found out about it "about the same time as the trustee did." *Id.* Counsel to Marrama did not attempt to reconcile this statement with the fact that the reason this refund was being paid was the fact that Marrama had applied for it in July of 2002. JA 30a-31a.

After hearing from counsel to all parties as well as the standing chapter 13 trustee, Judge Hillman read into the record his findings of fact and ruling of law. Fed. R. Bankr. P. 7052. Judge Hillman ruled that "I don't think there's an 'Oops' defense to the concealment of assets." He concluded that "this is a bad faith case" and denied Marrama's request for conversion to chapter 13. JA at 34a-35a.

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[7] Although counsel to the Petitioner continues to repeat his contention that the desire to convert to chapter 13 was due to the fact that the Debtor obtained employment after the Petition Date from his brother's company and therefore could afford to make payments under a chapter 13 plan, the Petitioner's *original* Schedule I indicates that as of the Petition Date, he was employed by his brother's company, Capital Carpet & Flooring, just as he was when the amended schedules were filed. SJA 18 and 30.

F. The Bankruptcy Appellate Panel's Ruling

On appeal, the United States Bankruptcy Appellate Panel for the First Circuit affirmed Judge Hillman's ruling. *Marrama v. Citizens Bank of Massachusetts* (*In re Marrama*), 313 B.R. 525 (B.A.P. 1st Cir. 2004). After reviewing the language contained in § 706(a) of the Bankruptcy Code, its legislative history and previous decisions that it and other courts had rendered, the panel found that:

> [T]he plain language of § 706(a), when read together with other sections of the bankruptcy code and rules, does not grant a debtor an absolute right to convert a case from Chapter 7 to Chapter 13; rather, the right to convert is presumptive and should be granted unless there are extreme circumstances showing that the debtor is abusing the jurisdiction of the Bankruptcy Court.

Id., 313 B.R. at 532-533. The panel went on to find that one important factor when determining whether extreme circumstances exist is "whether a debtor intentionally attempted to conceal assets from creditors." *Id.* The panel then applied the extreme circumstances standard to the facts in the Marrama case and found that there was:

> . . . a pattern of attempts to conceal assets – the pattern that began before the debtor filed his petition when he transferred the Maine Property for no consideration to the trust, and continued post-petition until the Chapter 7 trustee threatened action to recover the Maine Property. As has been stated by the United States Supreme Court, the opportunity provided by the bankruptcy law for a 'fresh start' is limited to the 'honest but unfortunate debtor.'

Id., 313 B.R. at 535 (*citing Grogan v. Garner*, 498 U.S. 279, 286-87 (1991)). The panel found that "because of the existence of extreme circumstances" constituting bad faith, Judge Hillman's decision should be affirmed. *Id.*

G. The Decision of the First Circuit Court of Appeals

On further appeal, a panel of the First Circuit unanimously affirmed the decision of the Bankruptcy Court. *Marrama v. Citizens Bank of Massachusetts (In re Marrama)*, 430 F.3d 474 (1st Cir. 2005). The panel indicated that its examination of the plain language of § 706(a) led them to conclude that "we can discern no evidence that the Congress intended to override the presumptive power and responsibility of the bankruptcy court to weed out abuses of the bankruptcy process at any stage in the bankruptcy proceeding." *Id.*, 430 F.3d at 478. The court found that the words "may convert" reasonably could suggest "that the right to convert is merely presumptive and may be exercised only if the debtor meets the pre-conditions of eligibility established in Bankruptcy Code § 109(e) or even then only in the absence of other exceptional circumstances." *Id.* The court found compelling the fact that § 1307(b) contains a much stronger dictate that "the court shall dismiss" a case upon the request of a debtor. *Id.* The court cited to its previous case of *Citizens Awareness Network, Inc. v. United States*, 391 F.3d 338, 346 (1st Cir. 2004) where it stated that "Congress' use of differential language in various sections of the same statute is presumed to be intentional and deserves interpretive weight." *Marrama*, 430 F.3d at 478. Although the court found that the plain language of § 706(a) did not create an absolute right of a debtor to convert his or her case to chapter 13, it also

examined the statute's legislative history. While the court stated that "the term 'absolute' is problematic if taken out of context in that it implies that the debtor's conversion right is unconditional" it found that "in context, the term 'absolute' likely constitutes a recognition either that the debtor may convert once as a matter of right or may not engage in successive conversions or that the debtor's right to convert cannot be waived by contract." *Id.*, 430 F.3d at 480. After finding that "nothing in the legislative history remotely negates or undermines the principle that the bankruptcy courts are duty bound to take all reasonable steps to preclude debtors from abusing or manipulating the bankruptcy process in order to undermine the essential purposes of the Bankruptcy Code," the court concluded that § 706(a) "permits the bankruptcy court to deny a chapter 7 debtor's subsection 706(a) motion to convert where the court determines that the debtor engaged in bad faith conduct." *Id.* After finding that the bankruptcy court's determination that Marrama engaged in bad faith conduct was amply supported by the record, the panel unanimously affirmed the lower court's ruling.

SUMMARY OF ARGUMENT

The bankruptcy schedules and statement of financial affairs filed by the Petitioner when he commenced his chapter 7 case contained several false statements concerning the Petitioner's real estate in Maine and his anticipated tax refund. When these assets were discovered by the Trustee, the Petitioner sought to halt the Trustee's liquidation efforts by converting his case to chapter 13. The Petitioner's attempt to convert was properly rejected by the bankruptcy court.

The plain meaning of § 706(a), including the use of the phrase "the debtor may convert," can be determined by reviewing "the language itself, the specific context in which the language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). Once these factors are considered, it becomes clear that the plain text of § 706(a) permits the bankruptcy court to review motions to convert filed pursuant to that subsection of the Bankruptcy Code. The Federal Rules of Bankruptcy Procedure, especially Rule 1017(f)(2), support the conclusion that Congress intended bankruptcy courts to have the discretion to allow or deny § 706(a) motions.

Nothing in the legislative history of § 706(a) contradicts the Respondent's position concerning the plain meaning of § 706(a). In fact, the legislative history for this subsection of the Bankruptcy Code, even if relevant, is of no help when trying to determine Congress' intent. The word "absolute" as used in the legislative history is susceptible to more than one meaning and the legislative history as a whole contains an incorrect description of § 706(a). (*See* discussion in Section II, *infra*)

The policy objectives of the bankruptcy laws strongly support the Respondent's position. Bankruptcy laws exist for the "honest but unfortunate debtor." *Grogan v. Garner*, 498 U.S. 279, 286-7 (1991). If the Petitioner's position is correct, a dishonest debtor would be able to manipulate the system by converting his or her case if undisclosed assets were discovered by the chapter 7 trustee. Also, if the Petitioner's position is correct, dishonest debtors would be encouraged to not disclose assets when they file a chapter 7 case since the relatively safe harbor of a chapter 13 would always be available. The policy underlying the bankruptcy

code strongly supports the Respondent's position that the bankruptcy court may review § 706(a) motions for bad faith.

The decision issued by the First Circuit Court of Appeals should be affirmed.

ARGUMENT

I. The Plain Meaning of 11 U.S.C. § 706(a) Provides the Bankruptcy Court with Discretion to Deny a Debtor's Motion to Convert a Case From Chapter 7 to Chapter 13.

When construing the provisions of a statute, it is the duty of the judiciary to effectuate the intent of Congress. *Negonsott v. Samuels*, 507 U.S. 99, 104 (1993), (*quoting Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982)); *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975) (superseded by statute on other grounds). To ascertain Congressional intent, courts must first look at the language of the statute to "determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997); *Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004); *Williams v. Taylor*, 529 U.S. 420, 431 (2000) (*citing United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989)). Courts must review a statute with the understanding that Congress "says in a statute what it means and means in a statute what it says there," *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992). In the absence of express legislative history to the contrary, further inquiry is prohibited "if the statutory language is unambiguous and the statutory scheme is

coherent and consistent." *Id.* (*quoting Ron Pair Enters., Inc.*, 489 U.S. at 240); *accord Hartford Underwriters Ins. Co. v. Union Planters Bank*, 530 U.S. 1, 7 (2000); *Reves v. Ernst & Young*, 507 U.S. 170, 177 (1993); *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992); *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

A. The Use of the Word "May" in § 706(a) Indicates that Congress Intended to Provide Bankruptcy Courts with the Discretion to Deny a Debtor's Motion to Convert.

To determine whether the statutory language is plain and unambiguous, courts may consider three factors: "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson*, 519 U.S. at 341 (*citing Cowart*, 505 U.S. at 477; *McCarthy v. Bronson*, 500 U.S. 136, 139 (1991)).

11 U.S.C. § 706(a) provides:

> the debtor may convert a case under this chapter [Chapter 7] to a case under chapter 11, 12 or 13 of this title at any time, if the case has not been converted under §§ 1112, 1208, or 1307 of this title. Any waiver of the right to convert a case under this subsection is unenforceable.

The Petitioner argues that the plain language of § 706(a) provides a debtor with an absolute right to convert a case to chapter 7. Since this right is absolute, the Petitioner argues, bankruptcy courts lack discretion to deny a request for conversion regardless of the underlying

circumstances that motivated the filing of the bankruptcy petition or the request to convert.[8] However, the plain language of § 706(a) is at odds with the Petitioner's view. That language does not include the phrase "absolute right." Although that phrase is found in the legislative history (*see* discussion in Section II, *infra*), a mechanical use of legislative history may not be substituted for a mechanical use of statutory language. *Heppner v. Alyeska Pipeline Service Co.*, 665 F.2d 868, 871 (9th Cir. 1981).

Congress' use of the word "may" merely indicates that the debtor is the only party who "may" seek to convert his or her case to chapter 12 or chapter 13.[9] In addition to indicating who may file a § 706(a) motion, Congress' choice of the word "may" in § 706(a) as opposed to the word "shall," clearly demonstrates an intent to afford discretion to bankruptcy courts with respect to the Debtor's ability to convert a case to chapter 7, not eliminate the court from the process. The definition of "may" and this Court's frequent construction of the usage of "may" in statutory provisions makes clear that "may" is used to connote discretion. *See* Black's Law Dictionary 993 (7th ed. 1999) ("Is permitted to . . . " or "Has a possibility (to)"); *Martin v. Franklin Capital Corp.*, 126 S. Ct. 704, 709 (2005) (holding

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[8] Petitioner's position, as summarized in the brief of Amicus Curiae, National Association of Consumer Bankruptcy Attorneys, is that "the plain language of 11 U.S.C. § 706(a) grants the debtor an unqualified one-time right to convert a chapter 7 bankruptcy case to chapter 13." As a preliminary matter, there can be no dispute that this position is incorrect at least to the extent of the "qualification" found in § 706(d) that the debtor must be eligible to be a chapter 13 debtor in accordance with § 109(e).

[9] *Compare* § 706(b) which allows 'parties in interest' to seek conversions to chapter 11.

that Congress' use of "may" in § 1447(c) rather than "shall" or "should" showed a grant of discretion); *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 533 (1994) (finding that the use of the word "may" in the attorney's fees provision of the Copyright Act indicated discretion and therefore did not require courts to award attorney's fees to the prevailing party); *Terre Haute & Indianapolis R.R. Co. v. Indiana*, 194 U.S. 579, 589 (1904) ("The word 'may,' it is agreed, is permissive, not mandatory."). The construction of "may" as either conferring or confirming a degree of equitable discretion "conforms to the even more important principle of statutory construction that Congress should not lightly be assumed to have enacted a statutory scheme foreclosing a court of equity from the exercise of its traditional discretion." *United States v. Rodgers*, 461 U.S. 677, 708 (1983).

Conversely, when Congress has sought to remove discretion from courts, it has readily used the word "shall" to express its intent. *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947) (use of "shall" indicates "the language of command," and leaves no room for the exercise of discretion by the trial court) (*citing Escoe v. Zerbst*, 295 U.S. 490, 493 (1935)); *Ass'n of Civilian Technicians v. FLRA*, 22 F.3d 1150, 1153 (D.C. Cir. 1994) ("The word 'shall' generally indicates a command that admits of no discretion on the part of the person instructed to carry out the directive"); Black's Law Dictionary 1375 (6th ed. 1990) ("As used in statutes . . . this word is generally imperative or mandatory"). Section 706(a) plainly states that "[t]he debtor *may* convert a case. . . ." If Congress had intended to strip the bankruptcy court of any role in a § 706(a) conversion it would have used language such as "the debtor shall be entitled to convert. . . ."

B. A Comparison of the Language Used in § 706(a) with the Language in Other Sections of the Bankruptcy Code Demonstrates that the Bankruptcy Court Has the Ability to Deny a Debtor's Request for Conversion.

To assist a court in determining the plain meaning of a statute, courts may also consult other provisions in the same statute. *See, e.g., S. D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 126 S. Ct. 1843, 1852 (2006), (*citing Bates v. United States*, 522 U.S. 23, 29-30 (1997) (if "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion")); *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932) (" . . . there is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning.")

A review of the structure and text of other, similar sections of the Bankruptcy Code reveals that when Congress wanted to require an action by the bankruptcy court, it had no problem so stating. The fact that Congress used the word "may" when it intended to provide the court with discretion and used "shall" when it chose to direct courts to act is demonstrated by the first two subsections of §§ 1208 and 1307.[10] In these sections, Congress used the

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[10] Section 1208 (a) and (b) read:

(a) The debtor may convert a case under this chapter to a case under chapter 7 of this title at any time. Any waiver of the right to convert under this subsection is unenforceable.

(Continued on following page)

words "may" and "shall" in adjacent subsections. Sections 1208(a) and 1307(a) which contain language nearly identical to § 706(a) – provide that the debtor "may" convert a chapter 12 or chapter 13 case to chapter 7 at any time. In contrast, §§ 1208(b) and 1307(b) provide that upon the debtor's request, the court "shall" dismiss a case. The interplay of "may" and "shall" in §§ 1208 and 1307 makes clear that when Congress intended to assert a mandatory directive, it did so by using plain language such as "shall."

Also, when the powers granted to the court by § 1307(c)[11] are considered, it is only logical that Congress

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(b) On request of the debtor at any time, if the case has not been converted under section 706 or 1112 of this title the court shall dismiss a case under this chapter. Any waiver of the right to dismiss under this subsection is unenforceable.

Section 1307 (a) and (b) read:

(a) The debtor may convert a case under this chapter to a case under chapter 7 of this title at any time. Any waiver of the right to convert under this subsection is unenforceable.

(b) On request of the debtor at any time, if the case has not been converted under section 706, 1112, or 1208 of this title, the court shall dismiss a case under this chapter. Any waiver of the right to dismiss under this subsection is unenforceable.

[11] Section 1307(c) provides:

Except as provided in subsection (e) of this section, on request of a party in interest or the United States trustee and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 7 of this title, or may dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause, including –

(1) unreasonable delay by the debtor that is prejudicial to creditors;

(Continued on following page)

intended to give bankruptcy courts the ability to deny § 706(a) motions when bad faith actions are uncovered. There is no question that a bankruptcy court can convert a chapter 13 case to chapter 7, or dismiss the case, if the court finds the debtor has acted in bad faith. Since a bankruptcy court, *during* a chapter 13 case, may dismiss

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(2) nonpayment of any fees and charges required under chapter 123 of title 28;

(3) failure to file a plan timely under section 1321 of this title;

(4) failure to commence making timely payments under section 1326 of this title;

(5) denial of confirmation of a plan under section 1325 of this title and denial of a request made for additional time for filing another plan or a modification of a plan;

(6) material default by the debtor with respect to a term of a confirmed plan;

(7) revocation of the order of confirmation under section 1330 of this title, and denial of confirmation of a modified plan under section 1329 of this title;

(8) termination of a confirmed plan by reason of the occurrence of a condition specified in the plan other than completion of payments under the plan;

(9) only on request of the United States trustee, failure of the debtor to file, within fifteen days, or such additional time as the court may allow, after the filing of the petition commencing such case, the information required by paragraph (1) of section 521;

(10) only on request of the United States trustee, failure to timely file the information required by paragraph (2) of section 521; or

(11) failure of the debtor to pay any domestic support obligation that first becomes payable after the date of the filing of the petition.

or convert to chapter 7 if it determines that the debtor has acted in bad faith, it would be illogical to think that the same court, having found bad faith conduct, would be prohibited from stopping the commencement of a chapter 13 case in the first place. *See* 11 U.S.C. § 1307(c); *In re Leavitt*, 171 F.3d 1219 (9th Cir. 1999) (finding that a court may dismiss a chapter 13 case for lack of good faith).

As the foregoing analysis shows, unless a statute specifically directs the court to grant the request of a party, the court is entitled to evaluate whether such request should be granted. Because § 706(a) lacks the mandatory indicia that binds the court in other sections of the Bankruptcy Code, the plain language of § 706(a) provides discretion for a court to deny a debtor's motion to convert.

C. The Requirement that a Debtor Must Request Conversion by Filing a Motion Pursuant to Fed. R. Bankr. P. 1017(f)(2) Demonstrates that a Court Has Discretion to Allow or Deny a Motion for Conversion.

The fact that the plain text of § 706(a) provides only that a debtor *may* request that the bankruptcy court convert his or her case is made clear by referring to the Federal Rules of Bankruptcy Procedure. Rule 1017(f) of the Federal Rules of Bankruptcy Procedure, as applicable to this case, became effective on December 1, 1999.[12] When read together with other sections of the Bankruptcy Code

[12] This Court ordered that the 1999 Amendments (in which Rule 1017(f) was added) should take effect on December 1, 1999. Because Congress neither disapproved nor amended the amendments, the 1999 amendments went into effect on December 1, 1999.

and with Federal Rules of Bankruptcy Procedure, this rule supports the Respondents' position that the "may" in § 706(a) means that the debtor may request conversion by filing a motion which will be reviewed by the bankruptcy court.

If the Petitioner is correct in its assertion that a debtor's right to convert is "absolute," then the debtor should only need to file a "notice" of conversion, not a motion. However, Rule 1017(f)(2) expressly requires the filing of a motion by a debtor who seeks conversion pursuant to § 706(a). Rule 1017(f)(2) provides: "[c]onversion or dismissal under § 706(a) . . . shall be on motion filed and served as required by Rule 9013."[13] After the filing of a motion pursuant to § 706(a), twenty days notice of the hearing concerning the motion must be given to the trustee and all creditors. Fed. R. Bankr. P. 2002(a)(4).[14]

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[13] Rule 9013 provides:

> A request for an order, except when an application is authorized by these rules, shall be by written motion, unless made during a hearing. The motion shall state with particularity the grounds therefore, and shall set forth the relief or order sought. Every written motion other than one which may be considered ex parte shall be served by the moving party on the trustee of debtor in possession and on those entities specified by these rules or, if service is not required or the entities to be served are not specified by these rules, the moving party shall serve the entities the court directs.

[14] Rule 2002(a)(4) provides in part:

> (a) Except as provided in subdivisions (h), (i) and (l) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees at least 20 days' notice by mail of . . .
>
> (4) in a chapter 7 liquidation case . . . the hearing on the dismissal of the case or the conversion of the case to another chapter. . . .

However, all requests by debtors to convert or dismiss their cases need to be sought through the filing of a motion. A debtor who wishes to convert his or her reorganization case *from* chapters 12 or 13 *to* chapter 7 may do so by filing a notice.[15] No court action is involved in order to convert the case.

Rule 1017(f)(3) provides:

> A chapter 12 or chapter 13 case shall be converted *without court order* when the debtor files a *notice* of conversion under §§ 1208(a) or 1307(a). The filing of the notice becomes the date of the conversion order for the purposes of applying § 348(c) and Rule 1019. . . . (emphasis added)

It has been argued that the requirement that a debtor file a motion and provide notice of the hearing, when he or she seeks conversion pursuant to § 706(a), is merely meant to give the court an opportunity to ensure that the restrictions provided in § 706(a) (no previous conversion) and § 706(d) (debtor is eligible to be a chapter 13 debtor) are met. *Marrama*, 430 F.3d 474, 479 n. 4. However, the restriction found in § 706(d) is also found in §§ 1208(e) and 1307(g)[16]

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[15] Since an individual debtor cannot be forced into chapter 12 or chapter 13, a chapter 12 or 13 debtor cannot be forced to stay in either of these chapters. *Toibb v. Radloff*, 501 U.S. 157, 165-166 (1991) (noting Congress' concern about an involuntary chapter 13 being a violation of the involuntary servitude prohibition of the Thirteenth Amendment); *In re Molina Y Vedia*, 150 B.R. 393, 399 (Bankr. S.D. Tex. 1992) (discussing the right of chapter 12 and chapter 13 debtors to dismiss their case in view of the Thirteenth Amendment to the United States Constitution).

[16] Sections 1208(e) and 1307(g), as of the effective date of the Bankruptcy Reform and Consumer Protection Act of 2005, provide: "Notwithstanding any other provision of this section, a case may not be converted to a case under another chapter of this title unless the debtor may be a debtor under such chapter."

and yet, as previously stated, conversions pursuant to §§ 1208(a) and 1307(a) are accomplished by the mere filing of a notice. Fed. R. Bankr. P. 1017(f)(3). Additionally, there is no reason to conduct a hearing merely to confirm that a debtor's case previously had not been converted and that the debtor had met the eligibility requirements because a review of the docket would indicate whether there had been previous conversions and a check of the schedules filed by the debtor would confirm whether or not the debtor met the eligibility requirements set forth in § 109(e).

D. The Arguments Presented by Amicus Curiae National Association of Consumer Bankruptcy Attorneys Concerning the Interaction between Subsections of § 706, other sections of the Bankruptcy Code and the Rules of Bankruptcy Procedure are Flawed.

Amicus Curiae, the National Association of Consumer Bankruptcy Attorneys ("NACBA"), argues that if Congress had intended to give the bankruptcy court a role in § 706(a) conversions, it could have included the same "the court may convert" language that is found in § 706(b)[17]. *See* NACBA Br. at 11. This argument is flawed for several reasons. First, it overlooks a fundamental distinction between the purposes underlying those two sections. Section 706(a) sets forth the requirements for a *debtor's voluntary* request to convert under § 706(a), whereas

[17] Section 706(b) provides: "On hearing of a party in interest and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 11 of this title at any time."

§ 706(b) discusses the requirements for a *non-debtor's* request to *involuntarily* convert a debtor's case. However, as recognized by Fed. R. Bankr. P. 1017(f), neither section prohibits the bankruptcy court from reviewing the request for conversion. Rule 1017(f)(2) provides that a debtor's request to convert a case under § 706(a) is brought pursuant to the motion procedure provided in Rule 9013, while Rule 1017(f)(1) provides that a motion to involuntarily convert a case under § 706(a) is brought as a contested matter under Rule 9014. Motions are also required for requests to convert or dismiss under sections 1112(b), 1208(c) and 1307(c). Even though a debtor's request for conversion under § 706(a) is not treated initially as a contested matter – likely because most requests for conversions will not involve dishonest debtors – the debtor must nevertheless file a motion to convert and "state with particularity the grounds" for the requested relief. Fed. R. Bankr. P. 9013.

NACBA's argument also ignores the import of § 706(c), which provides that: "*[t]he court may not* convert a case under this chapter to a case under chapter 12 or 13 of this title unless the debtor requests such conversion" (emphasis added). Since § 706(c) provides that the court "may not" convert a chapter 7 case to chapter 12 or 13 unless the debtor "requests such conversion," and the only way a debtor can "request[] such conversion" is by filing a § 706(a) motion, § 706(c) reinforces the fact that the court retains the discretion to decide a § 706(a) motion for conversion that is made by the debtor.

NACBA's contention that the alternative phrasings of § 706(a) "the debtor may convert" and § 1307(b), "the court shall [convert] . . . " is a "distinction without a difference" ignores the plain meaning of both statutes. *See* NACBA

Br. at p. 12. Canons of statutory construction make clear that when "may" and "shall" both appear in a statutory provision, the general inference is that each is used in its usual sense, the one act being permissive, the other mandatory. *Anderson*, *supra*, 329 U.S. at 485. In such instances, a court should not conclude that Congress intended "may" to provide a mandatory directive. *See Martin*, 126 S. Ct. at 709; *see, e.g.*, *Farmers & Merchants Bank v. Federal Reserve Bank*, 262 U.S. 649, 663 (1923) (concluding that the careful use of "may" in certain sections of the Federal Reserve Act and "shall" in other sections did not permit "may" to be construed as "shall"). The careful use of "may" in § 1307(a) and "shall" § 1307(b) makes clear that Congress intended to differentiate the discretion afforded to courts for conversions and dismissals. Congress' use of "may" in § 1307(a) and its identical counterpart § 706(a) demonstrates that Congress intended to provide the bankruptcy court with greater discretion in deciding requests for conversion.

Although NACBA argues that the plain meaning of § 706(a) supports its position, it looks to the legislative history of §§ 1307(a) and 1307(b) to support its position. The legislative history for §§ 1307(a) and 1307(b) provides that: "[s]ubsections (a) and (b) confirm, without qualification, the rights of a chapter 13 debtor to convert the case to a liquidating bankruptcy under chapter 7 of title 11, at any time, or to have the chapter 13 case dismissed." This statement is simply incorrect. Just as a conversion pursuant to § 706(a) is subject to qualifications concerning previous conversions and eligibility, there is no dispute that a debtor's right to convert pursuant to § 1307(a) is also not "without qualification." At the very least, to qualify for conversion under either section, a debtor must

first demonstrate his or her eligibility under the chapter to which he or she is seeking to convert.

E. The Canon of Expressio Unius Is Not Applicable to § 706.

In its brief, the NACBA asserts that § 706 provides two limitations on the debtor's right to convert: (i) the case must not previously have been converted and (ii) the debtor must be eligible for a new chapter. NACBA argues that the doctrine of *expressio unius* prevents the application of any other "unexpressed" or "unwritten" limitations. *See* NACBA Br. at p. 13. However, the NACBA has misinterpreted § 706 and the application of the *expressio unius* doctrine.

As suggested by the cases cited by the NACBA, the doctrine of *expressio unius* is applicable only when a statute *lists* explicit exceptions to a general rule. "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not implied, in the absence of evidence of a contrary legislative intent." *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616 (1980). The statute at issue in the *Andrus* case specifically listed certain exceptions.[18] *Id.* Similarly, this Court in *Toibb v. Radloff* focused on the specific language of § 109(d) which provides a list of who can be a chapter 11 or chapter 7 debtor: "Only a person that may be a debtor under chapter

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[18] "Title 41 U.S.C. § 252(e) (subsection (e)) states that § 252(c) 'shall not be construed to . . . permit any contract for the construction or repair of . . . roads . . . to be negotiated without advertising . . . , unless . . . negotiation of such contract is authorized by the provisions of paragraphs (1), (2), (3), (10), (11), (12) or (14) of subsection (c) of this section." *Id.*

7 of this title, except a stockbroker or a commodity broker, and a railroad may be a debtor under chapter 11 of this title" and § 109(b) which states: "A person may be a debtor under chapter 7 of this title only if such person is not – (1) a railroad; (2) a domestic insurance company, bank, . . . ; or (3) a foreign insurance company, bank, . . . engaged in such business in the United States." *Id.*, 501 U.S. 157, 161 (1991).

As this Court has indicated, the doctrine of *expressio unius* is applicable only when specific limitations are listed in the relevant statute. *See Andrus*, 446 U.S. at 616. Section 706, however, does not contain an explicit list of exceptions. In fact, the language of § 706 focuses on the rules governing different parties' rights with respect to conversion. Specifically, § 706(a) governs when a *debtor* may file a motion to convert his case, § 706(b)[19] governs when a *party in interest* may file a motion to convert a case and §§ 706(c) and (d)[20] govern when the *court* may not convert a case. Nothing in the statute sets forth or lists exclusive exceptions concerning when a debtor may

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[19] Section 706(b) provides: "On request of a party in interest and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 11 of this title at any time."

[20] Section 706(c) provides: "The court may not convert a case under this chapter to a case under chapter 12 or 13 of this title unless the debtor requests or consents to such conversion."

Section 706(d) provides:

> Section 706(d) provides: Notwithstanding any other provision of this section, a case may not be converted to a case under another chapter of this title unless the debtor may be a debtor under such chapter.

convert his or her case from chapter 7. Further, the limitation set forth in § 706(a) ("if the case has not been [previously] converted") is simply a limitation on when a debtor may file a motion to convert a case, not a limitation on the bankruptcy court's ability to take action on the motion.

II. Nothing in the Legislative History of § 706(a) Indicates that Congress Intended to Deprive Courts of the Ability to Deny Motions to Convert in Extreme Circumstances.

Notwithstanding the plain language of § 706(a), the Petitioner urges this Court to construe the discretionary "may" as the mandatory "shall," because the word "absolute" appears in the legislative history of § 706(a). Like the Petitioner, nearly every court that has determined that bankruptcy courts lack discretion to deny a § 706(a) request has relied heavily upon the legislative history of § 706(a). *See, e.g., In re Martin*, 880 F.2d 857, 858 (5th Cir. 1989) (legislative history makes clear Congress' intent to give the debtor an absolute one-time right to convert); *In re Carrow*, 315 B.R. 8, 14 (Bankr. D.N.Y. 2004) ("[i]n determining whether § 706, as a whole, confers an absolute right of conversion upon the debtor, courts are guided by the . . . legislative history . . . "); *In re Widdicombe*, 269 B.R. 803, 807 (Bankr. D. Ark. 2001) (" . . . the legislative history indicates that § 706(a) gives the debtor one absolute right of conversion of a liquidation case to a reorganization or individual repayment case").

As a threshold matter, if the language of a statute is plain and unambiguous, courts need not resort to the legislative history to construe the statute, *TVA v. Hill*, 437 U.S. 153, 184 n. 29 (1978). While legislative history may be instructive, courts have frequently expressed skepticism

about the usefulness of legislative history to show legislative intent, arguing that "it is a poor guide to legislators' intent because it is written by the staff rather than by members of Congress, because it is often losers' history ('If you can't get your proposal into the bill, at least write the legislative history to make it look as if you'd prevailed'), because it becomes a crutch ('There's no need for us to vote on the amendment if we can write a little legislative history'), because it complicates the task of execution and obedience (neither judges nor those whose conduct is supposed to be influenced by the law can know what to do without delving into legislative recesses, a costly and uncertain process)." *In re Sinclair*, 870 F.2d 1340, 1343-1344 (7th Cir. 1989), (*citing*, *Blanchard v. Bergeron*, 489 U.S. 87 (1989) (Scalia, J., concurring)); *Covalt v. Carey Canada Inc.*, 860 F.2d 1434, 1438-39 (7th Cir. 1988); *Electrical Workers v. NLRB*, 814 F.2d 697, 712-15 (D.C. Cir. 1987), and *id.* at 715-20 (Buckley, J., concurring); *FEC v. Rose*, 806 F.2d 1081, 1089-90 (D.C. Cir. 1986); *Wallace v. Christensen*, 802 F.2d 1539, 1559-60 (9th Cir. 1986) (Kozinski, J., concurring); *Hirschey v. FERC*, 777 F.2d 1, 7-8 (D.C. Cir. 1985) (Scalia, J., concurring). "Courts should carefully scrutinize whether the legislative history evidences Congress' intent or is merely the expression of one person's personal viewpoint injected into the record in an effort to sway the courts in a manner that person was unable to persuade the legislature." *Steinle v. Boeing*, 785 F. Supp. 1434, 1439 (D. Kan. 1992). Ultimately, the court cannot substitute a mechanical use of legislative history for a mechanical use of statutory language. *Heppner v. Alyeska Pipeline Service Co.*, 665 F.2d 868, 871 (9th Cir. 1981). Rather, courts should approach legislative materials critically, keeping in mind that the intent of Congress

is sought, and that various legislative materials are only better, or worse, evidence of that intent. *Id.*

A quick reading of the legislative history of § 706(a) appears to suggest that the debtor's right to convert is "absolute."[21] This would be an incorrect conclusion since there is at least the additional condition contained in § 706(d). Furthermore, since the provision contained in § 706(a) that "the right to convert" cannot be waived is not mentioned in the legislative history, the First Circuit properly determined that the term "absolute" in the legislative history may mean only "that the debtor's right to conversion cannot be waived by contract." *Marrama v. Citizens Bank of Massachusetts* (*In re Marrama*), 430 F.3d 474, 480 (1st Cir. 2005).

As the foregoing demonstrates, since the legislative history of § 706(a) is not consistent with § 706 as a whole and the use of the word "absolute," when read in context, is susceptible to different interpretation, the legislative history provides no assistance when attempting to determine congressional intent.

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[21] The legislative history of § 706(a) reads:

> Subsection (a) of this section gives the debtor the one-time absolute right of conversion of a liquidation case to a reorganization or individual repayment plan case. If the case has already once been converted from Chapter 11 or 13 to Chapter 7, then the debtor does not have that right. The policy of the provisions is that the debtor should always be given the opportunity to repay his debts.

H.R. Rep. No. 95-595, at 380 (1977); S. Rep. No. 95-989, at 94 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5880.

III. The Policy Objectives of the Bankruptcy Code are Consistent with the Determination that Congress Intended to Give Bankruptcy Courts Discretion when Considering a § 706(a) Motion to Convert.

Over ninety years ago, this Court articulated the policy objectives of this country's bankruptcy laws with regard to individual debtors as follows:

> [i]t is the purpose of the bankruptcy act to convert the assets of the bankrupt into cash for distribution among creditors, and then relieve *the honest debtor* from the weight of oppressive indebtedness, and permit him to start afresh, free from the obligations and responsibilities consequent upon business misfortunes.

Williams v. U.S. Fidelity & Guaranty Co., 236 U.S. 549 (1915) (emphasis added).

More recently, this Court has reiterated this policy by stating that the opportunity provided by the bankruptcy law for a "fresh start" is limited to the "honest but unfortunate debtor." *Grogan v. Garner*, 498 U.S. 279, 286-7 (1991) (" . . . a central purpose of the [Bankruptcy] Code is to provide a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy 'a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.' But in the same breath that we have invoked this 'fresh start' policy, we have been careful to explain that the Act limits the opportunity for a

completely unencumbered new beginning to the 'honest but unfortunate debtor.'" (internal citations omitted)).[22]

Courts have also readily acknowledged the equitable powers of the bankruptcy court to enforce the underlying policy objectives of the Bankruptcy Code. *In re Kestell*, 99 F.3d 146, 149 (4th Cir. 1996) ("[T]he Bankruptcy Code, both in general structure and in specific provisions, authorizes bankruptcy courts to prevent the use of the bankruptcy process to achieve illicit objectives. The right of debtors to a fresh start depends upon the honest and forthright invocation of the Code's protections.") "[B]ankruptcy courts have traditionally drawn upon their powers of equity to prevent abuse of the bankruptcy process and to ensure that a case be commenced in 'good faith' to reflect the intended policies of the Code." 2 L.

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[22] For similar statements by this Court concerning the policy behind the bankruptcy laws: *see Perry v. Commerce Loan Co.*, 383 U.S. 392, 396 (1966) ("[C]hapter XIII [of the former Bankruptcy Act (which provides relief to wage-earners)] provides a highly desirable method for dealing with the financial difficulties of individuals. It creates an equitable and feasible way for the honest and conscientious debtor to pay off his debts rather than having them discharged in bankruptcy."); *Wright v. Union Central Life Ins. Co.*, 304 U.S. 502, 514 (1938) ("The development of bankruptcy legislation has been towards relieving the honest debtor from oppressive indebtedness and permitting him to start afresh."); *Continental Ill. Nat'l Bank & Trust Co. of Chicago v. Chicago, R.I. & P. Ry. Co.*, 294 U.S. 648, 670-71 (1935) (Relief for honest debtors was "[o]ne of the primary purposes of [the bankruptcy acts]"); *Stellwagen v. Clum*, 245 U.S. 605, (1918) ("The federal system of bankruptcy is designed not only to distribute the property of the debtor, . . . but as a main purpose of the act, intends to aid the unfortunate debtor by giving him a fresh start in life, free from debts, except of a certain character, after the property which he owned at the time of bankruptcy has been administered for the benefit of creditors. Our decisions lay great stress upon this feature of the law – as one not only of private but of great public interest in that it secures to the unfortunate debtor, who surrenders his property for distribution, a new opportunity in life.").

King, Collier on Bankruptcy § 301.05[1], at 301-5 to 301-7 (1996). The First Circuit in *In re Tully* articulated the role of bankruptcy courts to prevent abuses as follows:

> [T]he very purpose of certain sections of the law . . . is to make certain that those who seek the shelter of the bankruptcy code do not play fast and loose with their assets or with the reality of their affairs. The statutes are designed to insure that complete, truthful, and reliable information is put forward at the outset of the proceedings, so that decisions can be made by the parties in interest based on fact rather than fiction. As we have stated, "the successful functioning of the bankruptcy act hinges both upon the bankrupt's veracity and his willingness to make a full disclosure." Neither the trustee nor the creditors should be required to engage in a laborious tug-of-war to drag the simple truth into the glare of daylight. The bankruptcy judge must be deft and evenhanded in calibrating these scales.

Id., 818 F.2d 106, 110 (1st Cir. 1987) (internal citations omitted).

Principles concerning the protection of only the "honest but unfortunate debtor" remain the touchstone for decisions denying conversion for dishonest debtors. *See, e.g.*, *Neely v. Smith* (*In re Neely*), 334 B.R. 863, 871 (D. Tex. 2005); *Finney v. Smith*, 141 B.R. 94 (D. Va. 1992); *Darst v. Wampler* (*In re Wampler*), 302 B.R. 601, 605 (Bankr. D. Ind. 2003); *In re Brown*, 293 B.R. 865, 871 (Bankr. D. Mich. 2003); *In re Marcakis*, 254 B.R. 77, 81 (Bankr. D.N.Y. 2000). Yet the Petitioner and the NACBA argue that when Congress drafted § 706(a) it intended to allow dishonest debtors to force bankruptcy judges to allow them to convert their cases notwithstanding their motives for

filing and untruthful statements or omissions made in their bankruptcy papers. If the Petitioner's position is correct, then debtors and their counsel would be encouraged to try to hide assets from their chapter 7 trustee with the knowledge that if the chapter 7 trustee discovers the hidden asset, the debtor can simply convert to chapter 13 and get a new trustee.

The Petitioner's position – that § 706(a) provides a mandatory right to conversion – would require bankruptcy courts to ignore outright abuses of the Bankruptcy Code and leads to a perversion of the purpose and object underlying the Bankruptcy Code. The potential abuse that can ensue from an automatic conversion to chapter 7 is illustrated by the following hypothetical posited in *In re Kuhn*, 322 B.R. 377, 394 (Bankr. N.D. Ind. 2005).

> Let's posit a case in which a Chapter 7 debtor "inadvertently" omits property of significant value from the Chapter 7 schedules. By luck or fate or hard work – it's hard to tell the difference sometimes – the Chapter 7 trustee gets wise and finds the hidden asset(s) and begins the process of administering them in the case for the benefit of creditors. "OOPS," says the debtor, "I don't want to lose my $50,000 undisclosed bank account, what do I do?!!?" The wise Chapter 13 practitioner whom the debtor consults says – "Not a problem: you have the absolute right to convert to a Chapter 13 under 11 U.S.C. § 706(a), and that'll put an end to the nasty Chapter 7 trustee trying to glom onto that account. All you'll have to do is confirm a plan that satisfies 11 U.S.C. § 1325(a)(4) by taking the value of the account into account in your distribution to creditors, and then pay that value over 3-5 years in convenient monthly installments over the term of

> your plan." The debtor replies, "But what happens to the account?" The wily practitioner responds, "It's yours to do with as you will. Even if your Chapter 13 case is unsuccessful and even if the case is converted back to Chapter 7, only what's left of the account is there for the Chapter 7 trustee thanks to 11 U.S.C. § 348(f)(1)(A).[23] Hey, with the money in the account, while you're in Chapter 13, buy a couple of new cars with cash (make sure they're kind of moderately priced), buy new appliances, build that dormer extension to your house, go out to eat at Red Lobster every night, buy new clothes, send your kid to summer camp, etc., etc., etc. – no one's going to say then that you spent the money in bad faith, so 11 U.S.C. § 348(f)(2)[24] won't apply." "Wow, thanks," says the debtor, "you're really smart." The wily lawyer, humble and honest for once, replies, "Don't thank me. It's your absolute right to convert your Chapter 7 case to a case under Chapter 13. Nuts to the Chapter 7 trustee! Hah!!"

In re Kuhn, 322 B.R. 377, 394 (Bankr. N.D. Ind. 2005).

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[23] Section 348(f)(1)(A) provides that:

> (f)(1) Except as provided under paragraph (2), when a case under chapter 13 of this title is converted to a case under another chapter under this title –
>
> > (A) property of the estate in the converted case shall consist of property of the estate, as of the date of filing of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion; . . .

[24] Section 348(f)(2), prior to its amendment in 2005, provided that: "If the debtor converts a case under chapter 13 of this title to a case under another chapter under this title in bad faith, the property in the converted case shall consist of the property of the estate as of the date of conversion."

The foregoing example illustrates how an automatic right to conversion may actually *encourage* debtors not to disclose assets in hope that a chapter 7 trustee does not discover such assets. A dishonest debtor who faces no risk that his motion for conversion could be denied would likely choose to file a chapter 7 case first without disclosing valuable assets and convert to a chapter 13 case only if his improprieties are discovered by the trustee.

In addition to encouraging debtors to commit abuses prior to filing a bankruptcy petition, an automatic right to conversion may allow a dishonest debtor to manipulate the bankruptcy system during a chapter 7 filing when his bad faith becomes apparent. For example, in *In re Brown*, the debtor's chapter 7 petition listed his residence as his primary asset, the value of which was significantly understated in his bankruptcy schedules. 293 B.R. 865, 867 (Bankr. W.D. Mich. 2003). The debtor failed to appear and testify at several scheduled § 341 meetings. *Id.*, 293 B.R. at 868. When the chapter 7 trustee attempted to sell the property, the debtor refused to allow access to the broker or the potential buyer. *Id.* The debtor's failure to permit an inspection forced the trustee to accept a reduced price from the potential purchaser. *Id.* When the court approved the sale, the debtor moved to convert his case to chapter 13 prior to the closing. *Id.* The court in *Brown* denied the debtor's conversion on grounds of bad faith. *Id.*, 293 B.R. 871. The court found that since the debtor filed his petition, he had made constant attempts to avoid the consequences of a chapter 7 bankruptcy – namely, the sale of his property. *Id.* The bankruptcy court further determined that the debtor's motion to convert was simply the debtor's latest attempt to manipulate the bankruptcy process to prevent the sale of his property and that the "'absolute'

nature of the conversion right does not extend, however, to situations where conversion is sought as a means of thwarting the chapter 7 trustee's attempts to administer the bankruptcy estate or of escaping unintended consequences of a chapter 7 petition." *Id.*

Pursuant to § 348(e), conversion of a case terminates the service of any trustee that is serving on the case before such termination.[25] "At the moment the bankruptcy court grant[s] [the debtor's] motion to convert, the Chapter 7 trustee los[es] jurisdiction over the case. In effect, the trustee became just another creditor with standing to recover fees from the estate, but without standing to act on behalf of the estate, either to challenge the conversion or for any other purpose, including prosecuting or defending tort actions that belonged to the estate." *Cable v. Ivy Tech State College*, 200 F.3d 467, 474 (7th Cir. 1999) (internal citations omitted).

If converted, all property of a chapter 13 estate, including causes of action, vests in the debtor. The chapter 7 trustee's service is terminated, and the chapter 7 trustee no longer has standing to continue any litigation that had been commenced before conversion. *In re Grossot*, 205 B.R. 341, 343 (Bankr. D. Fla. 1997); *In re Rakosi*, 99 B.R. 47, 50 (Bankr. D. Cal. 1989).

There are several ways a dishonest debtor can exploit the chapter 7 trustee's loss of jurisdiction. One example involves the recovery of preferences:[26]

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[25] 11 U.S.C. § 348(e): Conversion of a case under section 716, 1112, 1208 or 1307 of this title terminates the service of any trustee or examiner that is serving in the case before such conversion.

[26] *See* 11 U.S.C. § 547.

> A debtor makes a preferential transfer of $100,000 to his mother ten months before filing his bankruptcy petition. The chapter 7 trustee discovers this undisclosed asset and files an adversary complaint to avoid and recover the transfer. Once the complaint is filed, the debtor files a motion to convert his case to chapter 13.

As noted above, the debtor's conversion of the case would automatically terminate the service of the chapter 7 trustee, including the trustee's right to pursue recovery of the preferential transfer. *See Cable*, 200 F.3d at 474. In addition, as noted in *In re Ciavarella*, the debtor's conversion would also vest the right to pursue the complaint in the *debtor*, not the chapter 13 trustee. 28 B.R. 823, 826 (Bankr. D.N.Y. 1983). In *Ciavarella*, the court noted:

> [T]he Chapter 13 trustee does not possess the full panoply of weapons available to a trustee under either Chapter 7 or Chapter 11. As indicated earlier, the Chapter 13 trustee's functions are restricted under Code § 1302 to administrative matters. Indeed, there is some dispute even as to whether or not a Chapter 13 trustee has standing to seek the conversion of a Chapter 13 case to a liquidation case under Chapter 7. In [*In re Kutner*, 3 B.R. 422 (Bankr. N.D. Tx. 1980)], the court characterized the Chapter 13 trustee as "more of a hybrid ombudsman." [] . . . The Chapter 13 debtor alone controls whether or not he or she remains in Chapter 13 and how much of future income or earnings should be offered for distribution to the unsecured creditors via the "ombudsman" Chapter 13 trustee.

In re Ciavarella, 28 B.R. 823, 827 (Bankr. D.N.Y. 1983); *accord Freeman v. Eli Lilly Federal Credit Union* (*In re Freeman*), 72 B.R. 850, 854 (Bankr. E.D. Va. 1987) (" . . . the

Chapter 13 trustee's functions are restricted to essentially administrative matters. . . . His basic role is to review plans, advise the Court with respect to plans and act as a disbursing agent under confirmed plans. . . .") (internal citations omitted).[27]

The court in *Ciavarella* also explained the role of a chapter 13 debtor in recovering preferential transfers:

> Unlike a Chapter 11 case, where the debtor may commit pre-petition earnings and assets towards funding a plan of reorganization that must be accepted by the creditors, a Chapter 13 debtor's plan merely calls for the debtor to submit "all or such portion of *future earnings* or other *future income* of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan." (Emphasis added.) *See* [11 U.S.C.] § 1322(a)(1). Thus, the debtor's past conduct, whether dischargeable or not under Chapter 7, and his prepetition income and assets are not material to the administration of a Chapter 13 case. The creditors are only entitled to share in the debtor's future income. *Even if preferences are recoverable in a Chapter 13 case, the creditors do not participate in the assets so recovered; their*

[27] Some courts have held that the chapter 13 trustee, not the debtor, retains the power to avoid preferential transfers. *See Miller v. Brotherhood Credit Union (In re Miller)*, 251 B.R. 770, 772 (Bankr. D. Mass. 2000); *Hill v. Fidelity Fin. Serv. (In re Hill)*, 152 B.R. 204, 206 (Bankr. S.D. Ohio 1993) ("plain meaning of the language in § 547 provides that the trustee is the only party who has the authority to avoid a preference under § 547."); *Pilgreen v. Brown & Williamson Fed. Credit Union (In re Pilgreen)*, 161 B.R. 552, 554 (Bank. M.D. Ga. 1989) (observing that the language of the Bankruptcy Code does not provide chapter 13 debtors with avoidance powers of a trustee).

> *share of the distribution is derived solely from the debtor's future income and earnings.*

Ciavarella, 28 B.R. at 826-827 (emphasis added). In jurisdictions that follow the reasoning in *Ciavarella*, a dishonest debtor could transfer significant assets to friends and family and omit such transfers from his bankruptcy petition. If the chapter 7 trustee discovers such transfers and seeks to avoid them, the debtor need only convert to chapter 13 to keep the transferred property from being included in the bankruptcy estate.

The foregoing scenario also demonstrates how allowing a dishonest debtor to convert a case automatically after his misdeeds have been unearthed by a chapter 7 trustee encourages the practice of "trustee shopping." When faced with a chapter 7 trustee who pursues undisclosed assets, the dishonest debtor can attempt to persuade the chapter 13 trustee that the undisclosed assets are not property of the bankruptcy estate. This is exactly what Marrama would have done if his case had been converted to chapter 13. In such an instance, the debtor has a second opportunity to escape the consequences of his initial bad faith.

Also, while it is true that a debtor who converts a chapter 7 case to chapter 13 may not automatically dismiss his case pursuant to § 1307(b), the practical realities of case administration can allow a dishonest debtor to cause his case to be dismissed without seeking leave from the court. The vast majority of chapter 13 plans are unsuccessful because debtors are unable to make their monthly payments to the chapter 13 trustees. When these monthly payments are missed, the chapter 13 trustees

routinely file motions to dismiss the bankruptcy case. Honest debtors, who feel they can catch up if given a chance, will file an objection to the motion to dismiss and seek a chance to become current with their payments. A dishonest debtor, who purposely fails to make the payments to trigger a motion to dismiss, will merely sit back and allow the case to be dismissed. Unless someone objects to the dismissal, the debtor will exit his bankruptcy and still retain all property without any adverse consequence. Of course, even if a debtor is forced to convert his case back to chapter 7, the bankruptcy estate could suffer unavoidable harm in the interim. Examples of such harm include potential squandering of assets by the debtor, as evidenced by *Kuhn*, or a significant devaluation of assets caused by the debtor's improper use or abuse of assets such as a vehicle or boat. Also, a potential purchaser of property may no longer be interested in buying the property after a re-conversion thus forcing the trustee to sell the property at a reduced price. Finally, if the debtor stops making payments on a secured loan, such as a mortgage or stops paying real estate taxes, the bankruptcy estate would realize less value for such property upon liquidation in the reconverted case.

All of the above examples are not far-fetched possibilities for a debtor who has already shown a proclivity towards manipulation and abuse of the Bankruptcy Code. To the extent a debtor is found to have engaged in bad faith, the bankruptcy court must be allowed to prevent that debtor from further abuses.

The Petitioner's construction of § 706(a) eviscerates the fundamental purpose underlying the Bankruptcy Code and allows dishonest debtors to escape the consequences of their dishonesty by allowing them to retain the same

property they attempted to hide from the trustee. Such an outcome could not have been a result Congress intended.

IV. Marrama's Due Process Rights Were Not Violated When the Bankruptcy Court Denied Conversion of His Case.

The Petitioner's brief contends, for the first time,[28] that his due process rights were violated when the bankruptcy court denied his request to convert his case. The Petitioner alleges that this violation occurred because the bankruptcy court made its ruling without the benefit of an evidentiary hearing.

It is uncontested that Marrama's counsel never asked the bankruptcy court for an evidentiary hearing. Even if such a request had been made, no further evidence was required in order for Judge Hillman to make his ruling. JA 34a-35a. There was no allegation that Marrama did not sign his bankruptcy papers under the pains and penalties of perjury stating that he had read them prior to signing. There is also no disagreement that certain statements contained in Marrama's bankruptcy papers were false.

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[28] Absent exceptional circumstances, the Court has consistently refused to review arguments which were neither raised nor addressed by courts below. *Granfinanciera, S. A. v. Nordberg*, 492 U.S. 33, 39 (1989) ("Although 'we could consider grounds supporting [the] judgment different from those on which the Court of Appeals rested its decision,' 'where the ground presented here has not been raised below we exercise this authority "only in exceptional cases."'" (*quoting Heckler v. Campbell*, 461 U.S. 458, 468-469 n. 12 (1983)); *see, e.g., Grupo Mexicano De Desarrollo v. Alliance Bond Fund*, 527 U.S. 308, 319 n. 3 (1999) (refusing to address petitioner's argument concerning the applicability of state law in determining the availability of injunctions, when argument was neither raised nor considered below).

The Petitioner also contends that his due process rights were violated since Judge Hillman made his ruling prior to reviewing Marrama's chapter 13 plan which was not filed prior to the hearing.[29] The Petitioner's argument misses the point that the bankruptcy court's ruling was that the bankruptcy petition and the attempt to convert were the acts undertaken in bad faith. Whether the chapter 13 plan would have been (or could have been) filed in good faith was not the issue.

CONCLUSION

For the foregoing reasons, the decision below of the United States Court of Appeals for the First Circuit should be affirmed.

Respectfully aubmitted,

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[29] Fed. R. Bankr. P. 3015(b) provides that a chapter 13 plan "shall be filed within 15 days of conversion to chapter 13."